



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

City of Eau Claire, Petitioner

Case No. 98-H-1085

v.

Town of Union, Respondent

FINAL DECISION

The City of Eau Claire (City) applied to the Town of Union (Town) for permission to install a sanitary sewer within the limits of a roadway located in the Town. The Town granted the City's request with conditions. The City found the conditions unacceptable and on July 20, 1998, filed a Notice of Appeal with the Division of Hearings and Appeals pursuant to sec. 86.15(5), Stats. Pursuant to due notice, a hearing was held in Eau Claire, Wisconsin on August 10, 1998, before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

City of Eau Claire, by

Attorney Ted Fischer
Office of the City Attorney
203 South Farwell Street
P. O. Box 5148
Eau Claire, WI 54702-5148

Town of Union, by

Attorney John D. Hibbard
712 South Barstow Street
Eau Claire, WI 54701

The Administrative Law Judge issued a Proposed Decision in this matter on August 19, 1998. No comments on the Proposed Decision were received. The Proposed Decision is adopted as the final decision in this matter.

Findings of Fact

The Administrator finds:

1. Kohlepp Road is a street running in an east-west direction on the west side of the City of Eau Claire (City). Kohlepp Road (east of Preston Road) forms a portion of the border between the City and the Town of Union (Town).
2. The City proposes to extend its sanitary sewer and water utilities in Kohlepp Road between North Clairemont Street and Preston Road. One hundred and fifty feet of Kohlepp Road immediately east of Preston Road is within the jurisdiction of the Town. The extension of the water main will end prior to the portion of Kohlepp Road which is within the Town. The sanitary sewer will extend through this portion of Kohlepp Road and connect to an existing sanitary sewer main within the right-of-way of Preston Road.
3. The City requested permission from the Town to construct a portion of the sanitary sewer within the right-of-way of the section of Kohlepp Road within the Town's jurisdiction. By letter dated July 7, 1998, the Town gave the City permission subject to certain conditions. The conditions as set forth in the letter are:
 1. The properties on each of the four corners created by the intersection of Kohlepp Road and Preston Road shall be treated as "*parcels of land in the Town abutting the portion of Town road to be disturbed*" and furnished utility services under the provisions of paragraph 5(b) below.
 2. That the City, acting through its City Manager, enter into good faith scheduled discussions with the Town Board Chairperson for the purpose of seeking a preliminary outline of what could become a Cooperative Plan under §66.023, Wisconsin Statutes. It is anticipated that both participants would be supported, when useful, by their respective planners, attorneys or other advisors. The goal of the discussions would be to achieve a sufficiently attractive preliminary outline that each participant could recommend adoption of an Authorizing Resolution under §66.023(4)(a), Stats., to their respective municipal legislative bodies.

Permission was also conditioned upon compliance with the following Town ordinances:

3. Except as provided in paragraph 4 below, whenever a permit has been granted to any person to excavate or install facilities within any highway right-of-way, such person shall restore the same to a condition as good as it was before.
4. If permitted construction will result in the destruction of more than 50% of the existing pavement for 50 or more linear feet measured

on the centerline of the right-of-way, the entire roadway in the disturbed area shall be replaced by the permittee. Such replacement and any repairs or patching shall meet minimum Town road standards in effect at the time the permit is granted or, if the previous construction of the disturbed areas exceeded those standards, the replacement shall be equal to or better than the roadway replaced, as required in advance of construction is required, the permittee, unless excused by the Town Board or the Town Chairperson pursuant to policies adopted by the Town board, shall file a completion bond issued by a surety company licensed in the State of Wisconsin assuring completion and reconstruction according to the terms of the permit.

5. As a condition of any permit issued pursuant to this ordinance, the applicant shall:

(a) Indemnify the Town and hold the Town harmless for any damages, claims, causes of action, losses or liability resulting from the exercise of this permit. The Chairperson or the Clerk may require from such applicant a certificate of insurance or other evidence of the financial ability of the applicant to meet its obligations under this provision.

(b) Provide to all parcels of land in the town abutting the portion of Town Road to be disturbed, the use of any utility or utility service installed therein. No such utility service shall be available to such abutting parcel until the owner or occupant thereof requests said service, pays for installation of said utility service on the same basis as that imposed on the majority of the existing customers of said utility, and pays for the utility service provided conditions for the provision of service except that said utility service may be denied if providing the same would result in actual, rather than speculative, danger to public health or safety or danger to the health or safety of the occupants of the parcel.

4. The City objects to the condition requiring it to connect the four town properties to the City's sanitary sewer and to the condition that they enter into good faith discussions leading to a Cooperative Plan between the Town and the City pursuant to sec. 66.023, Stats.

5 The four properties which the Town is seeking to have connected to the City's sanitary sewer system are located at the four corners of the intersection of Kohlepp Road and Preston Road. At the hearing the properties were referred to as NE, SE, SW and NW based upon the corner of the intersection at which the property was located (Ex. 3). Properties NE and SE abut the portion of Kohlepp Road which would be disturbed and; therefore, presumably, fall within the provisions of the Town ordinance referred to in condition 5(b).

6. Preston Road is within the jurisdiction of the Town of Union. As mentioned above, the City has an existing sanitary sewer main within Preston Road. At the time this sewer line was constructed laterals to properties NE, SE, SW and NW were constructed and capped at the property line. These laterals are available for the property owners to connect to when, and if, these properties are annexed to the City. The City has a policy prohibiting the connection of any property to City utilities unless the property is annexed to the City.

7. The driveway for property NE is located on Kohlepp Road. It is anticipated that the construction of the sanitary sewer will cause this driveway to be blocked for "several" days. The property owner will have access to his property from Preston Road during the time access to his driveway is blocked.

8. For the reasons set forth below, the conditions to which the City objects are not reasonably related to the issues before the Division of Hearings and Appeals and will not be made part of the order. Upon compliance with the conditions in the Order, the proposal of the City will not result in an unreasonable obstruction to traffic on Kohlepp Road.

Discussion

The City objects to two of the conditions imposed by the Town. The City objects to the condition that it enter into good faith discussions leading to a Cooperative Plan between itself and the Town. At the hearing, the Town acknowledged that this condition is not related to the proposed project; however, the Town alleged that it has had difficulty getting a response from the City of Eau Claire relative to such a Cooperative Plan and saw the City's request as an opportunity to pursue the issue. The development of a Cooperative Plan may be a good idea; however, it is not related to the proposed sanitary sewer extension and it would be inappropriate for the Division of Hearings and Appeals to attach this condition to permission to construct the a sanitary sewer within a Town road.

The other condition which the City objects to is connecting the four Town properties to the City sanitary sewer. As discussed in the Findings of Fact, only two of these properties (NE and SE) are actually abutting properties which would fall within the provision of the Town ordinance. However, the Town feels the other two properties (NW and SW) should also be allowed to connect to the City's sanitary sewer as compensation for the inconvenience associated with the construction in their neighborhood.

The Division of Hearings and Appeals' jurisdiction in these matters is based upon a policy of avoiding unreasonable obstructions to public roadways. In City of Appleton v. Transportation Commission, 116 Wis.2d 352, 342 N.W.2d 68 (Ct. App., 1983), the court held that the Transportation Commission, a predecessor agency in these matters, had the authority to impose a condition that the City of Appleton connect abutting property owners within the Town of Grand Chute as a condition for extending a sewer line within the right-of-way of a Town of Grand Chute Road. The rationale for this condition was that by requiring the City of Appleton to connect abutting property owners at the time of construction, a subsequent obstruction to traffic would be avoided at the time those property owners were connected to the sanitary sewer line.

In the instant matter, the Town is actually seeking permission for the property owners to connect to a sanitary sewer line which already exists within Preston Road, not the proposed sanitary sewer line within Kohlepp Road. The Town ordinance notwithstanding, there is no reasonable relationship between construction within the Kohlepp Road right-of-way and a requirement to connect the four subject properties to a sanitary sewer line within Preston Road. The laterals on Preston Road are already constructed up to the property lines and those property owners can be connected at such time when those properties are annexed to the City without further obstruction to traffic on either Kohlepp Road or Preston Road.

As mentioned above, properties NE and SE may be within the provisions of a Town ordinance requiring the City to connect those properties to the sanitary sewer main as a condition for approval of the construction of the sanitary sewer main within the right-of-way of Kohlepp Road within the Town of Union. It is beyond the jurisdiction of the Division of Hearings and Appeals to attempt to interpret the Town's ordinance or the applicability of the ordinance to this case. If the Town wishes to enforce their ordinance it would need to do so in circuit court. The laterals to connect these properties are already in place. If the Town successfully enforces its ordinance, no additional obstruction to traffic will result at the time these properties are connected to the City sanitary sewer. Therefore, it is unnecessary to condition permission for the City to construct the sanitary sewer within the Town portion of Kohlepp Road on the City connecting any of the four properties.

Conclusions of Law

The Administrator concludes:

1. The proposed construction by the City of Eau Claire of a sanitary sewer within the right-of-way of Kohlepp Road within the Town of Union is in the public interest. Upon compliance with the conditions set forth in the following order, construction and maintenance of this sanitary sewer will not constitute an unreasonable obstruction to traffic on Kohlepp Road.
2. Pursuant to secs. 86.16(5) and 227.43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

Order

The Administrator orders:

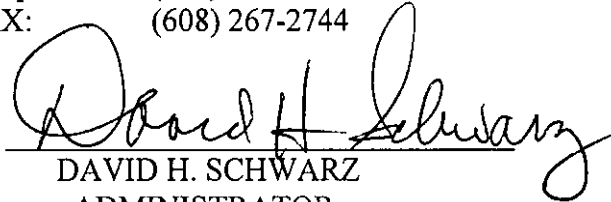
The Town of Union shall grant the City of Eau Claire permission to connect the proposed sewer main within the right-of-way of Kohlepp Road within the Town of Union. During the construction of the segment, the City will ensure that there is adequate access to the residences abutting Kohlepp Road. The City shall indemnify the Town for any damages or injuries arising

out of the construction or maintenance of the proposed utilities. After construction, the City shall restore Kohlepp Road to a condition at least as good as its preconstruction condition.

Dated at Madison, Wisconsin on September 4, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


DAVID H. SCHWARZ
ADMINISTRATOR